

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
JOEL SMITH,

Petitioner-Appellee,

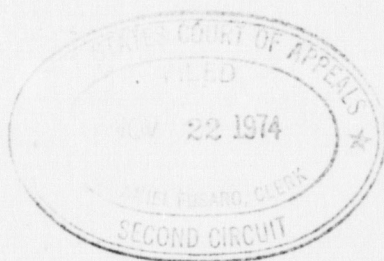
-against-

THE HONORABLE ERNEST L. MONTANYE,
Superintendent,
Attica Correctional Facility,

Respondent-Appellant.

Docket No. 74-2158

PETITION FOR REHEARING
WITH SUGGESTION
FOR REHEARING EN BANC



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UNITED STATES OF AMERICA ex rel.
JOEL SMITH,

-against-

Respondent-Appellant.

Docket No. 74-2158

Pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, petitioner Joel Smith respectfully seeks rehearing, with suggestion for rehearing en banc, from a decision of a panel of this Court (Hays, Anderson, and Mansfield, C.JJ.) rendered on November 8, 1974, reversing an order of the United States District Court for the Eastern District of New York (Dooling, D.J.) granting a writ of habeas corpus, holding that petitioner had failed to exhaust state remedies and that his

claims of constitutional error, the introduction of evidence in violation of Bruton v. United States, 391 U.S. 123 (1968), and a jury charge violative of due process of law, were without merit.

As to each of these issues, the decision of the Court was incorrect because of misinterpretation of applicable principles, and results in a conflict with other decisions of this Court.

I

The panel decision held that petitioner failed to exhaust available state remedies, as required by 28 U.S.C. §2254(b) and (c), in that, following Judge Dooling's decision of April 9, 1974, suggesting that petitioner seek relief in state court on the Bruton and jury instruction claims of error, petitioner chose the wrong state forum by applying to the Appellate Division for rehearing of his original appeal rather than seeking a hearing in Supreme Court, pursuant to McKinney's, New York Crim. Pro. Law §440.10(1)(h) (the successor to the writ of error coram nobis), and that even if petitioner properly went to the Appellate Division, he failed to apply to the New York Court of Appeals for leave to appeal from the Appellate Division's denial of relief. This ruling is clearly erroneous.

Notwithstanding decisions of this Court holding that coram nobis relief is the preferred method for raising a Bruton issue

in New York State courts. (see, e.g., United States ex rel. Sloan . McMann, 415 F.2d 275 (2d Cir. 1969)), petitioner, without assistance of counsel at the time, did obtain a legitimate decision on the merits of his constitutional claims from the Appellate Division. The Appellate Division treated petitioner's motion for reargument, made pursuant to McKinney's, New York Crim. Pro. Law §470.15(1), as a proper claim for relief, and denied petitioner's claims on the merits, asserting that they had considered all the issues:

... With due respect to any view which the United States District Court may have, this court has considered all the issues on this motion and the predicate appeal. We adhere to our position after reconsideration and trust that the Federal court will likewise respect the autonomous jurisdiction of this court over the subject matter of the appeal.

Order of the Appellate Division,
Second Judicial Department,
July 2, 1974.

This decision establishes that the state courts had a full opportunity to consider, and did consider, petitioner's claims, which is all that is required by the doctrine of "exhaustion." Picard v. Conner, 404 U.S. 270, 275 (1971); Darr v. Burford, 339 U.S. 200, 204-211 (1950). Moreover, even the panel decision recognized that the Appellate Division's decision on the merits might well have foreclosed the State Supreme Court from reviewing petitioner's claims:

Although N.Y.C.P.L. §440.10(1)(h) (McKinney 1971), the successor to the writ of error coram nobis, normally provides an adequate post-conviction procedure to adjudicate pre-

viously unconsidered constitutional claims, we are uncertain in this case whether the Appellate Division's statement accompanying its denial of petitioner's motion to reargue that "it has considered all the issues on this motion and the predicate appeal" would be viewed by lower state courts as a "determination on the merits by New York state courts upon direct appeal from the judgment of conviction," in which the lower court would be required to deny a §440.10 motion. N.Y.C.P.L. §440.10(2)(a) (McKinney 1971). In addition, even were it held that the merits of petitioner's constitutional challenges were not determined on appeal, further state court review of the charge to the jury may be foreclosed since under N.Y.C.P.L. §440.10(2)(c) a motion to vacate a judgment must be denied where sufficient facts appear in the record to have permitted adequate appellate review of an issue and the issue was nevertheless not raised on appeal. See United States ex rel. Lesson v. Damon, 496 F.2d 718, 720 (2d Cir. 1974).

United States ex rel. Smith v. Montanye, No. 74-2158, slip opinion 353, 359-360 fn. (2d Cir., November 8, 1974).

As this Court recently noted, a decision on the merits of constitutional claims had from even an improper state court forum suffices to satisfy exhaustion:

... "Invocation of an improper remedy will suffice as an exhaustion only on a clear indication that the federal question was considered on the merits."

United States ex rel. Johnson v. Vincent, No. 74-1401, slip opinion 5889, 5897 (2d Cir., November 8, 1974), quoting from United States ex rel. Cuomo v. Fay, 257 F.2d 438, 442 (2d Cir. 1958), cert. denied, 358 U.S. 933 (1959).

Here, petitioner's resort to the Appellate Division was legally proper, although not preferred. The Appellate Division treated petitioner's motion for reargument as procedurally proper, and rendered a decision on the merits. Petitioner's constitutional claims, therefore, were "fairly presented to the state courts," Picard v. Conner, supra, 404 U.S. at 275-276.

II

The penal decision held that jury instructions (annexed as Exhibit A to this petition) given at petitioner's trial were not error of a constitutional dimension. This conclusion is erroneous, because the charge was not only incorrect on certain specific points of law, but also because the trial judge failed to instruct the jurors of the elements necessary to establish guilt under the State's two theories of guilt.

These faults were recognized below by Judge Dooling:

... The jury was not instructed as to what, if any, verdict and which, if either, count they could find against petitioner if not satisfied that he was an active participant in the first affray but were satisfied that he inflicted two later wounds and were not convinced that the wounds he inflicted were among the fatal wounds. From Fred Sprinkler's testimony the jury might have concluded that Fred Sprinkler's wounds in the abdomen had killed Cross and that the undescribed wounds inflicted by petitioner, if he inflicted any (for that depended on acceptance of the testimony respecting his alleged admissions) were not mortal and did not accelerate death.

* * *

What is lost in the approach of the charge is that it gave the jury no opportunity to decide that the killing was a grisly misadventure resulting from a senseless irruption of words in the middle of the drinking bout rather than a killing "in the heat of passion."

Memorandum and Order, April 9, 1974, at 12-13, 16-17.

The panel decision cites no language from the charge or other reasons for reversing Judge Dooling's opinion that the instructions were violative of due process of law.

III

The panel decision also reversed Judge Dooling's holding that the introduction into evidence of two statements the non-testifying co-defendant, Leroy Sprinkler, made inculpatory petitioner was a violation of Bruton v. United States, 391 U.S. 123 (1968), as made retroactive by Roberts v. Russell, 392 U.S. 243 (1968). The panel reasoned that no "devastating risk" was present because Sprinkler's statements were corroborated by two other witnesses. This ruling is fallacious because not only were Sprinkler's statements of doubtful veracity, Sprinkler having much to gain by putting blame on petitioner, but the statements of the other two witnesses were of equally questionable credibility. The other witnesses, Fred Sprinkler, Leroy's brother, and Thomas Abrams, Leroy's friend, had great motivation for shifting responsibility for the deed from Leroy to petitioner.

In United States v. Castello, 426 F.2d 905 (2d Cir. 1970),

this Court found a violation of Bruton in circumstances virtually identical to those in this case. There, as here, the Government's case rested almost exclusively on the testimony of co-defendants and other persons of doubtful credibility and on an inconclusive connection between the defendant and the weapon in question. Not only did this Court find a violation of Bruton in these circumstances, but distinguished the Castello fact situation from that where a defendant makes an "interlocking" confession, such as in United States ex rel. Catanzaro v. Mancusi, 404 F.2d 296, 300 (2d Cir. 1968), which case was relied upon by the panel as precedent for reversal of Judge Dooling's decision in this case.

CONCLUSION

For the above-stated reasons, the petition should be granted and the opinion of the panel of this Court vacated and modified.

Respectfully submitted,

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APPENDIX A

THE TRIAL COURT'S CHARGE TO THE JURY

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day in your experiences in life, socially, in business, and otherwise. After meeting with people socially, after having business meetings with people, you instinctively, you intuitively reach certain conclusions about their character or make-up. You get that. That is all derived from your meeting with people and associating with them. You will apply that same knowledge, apply those tests, those standards that you apply there, here. How do the witnesses here impress you? Were they truthful? Were they frank? Did they vacillate; did they equivocate? Do you find that any witness had an interest in the outcome of this trial to such an extent that the witness might have colored his testimony? Do you find that any witness deliberately testified falsely regarding any material fact in the case? If you do, you may disregard such witness' entire testimony or you may accept so much of it as you believe to be true and disregard the rest of it.

During the trial, objections were interposed by both sides to this litigation, and it is a litigation gentlemen. On the one hand we have the People of the State of New York, the plaintiffs, against the defendants, and it is a litigation. We call it a prosecution by indictment.

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As I said, objections were interposed. I either sustained the objections or I overruled them. I did so advisedly, not because of favoritism to one side as against the other, but I ruled as I did because in my judgment, the questions asked by either side either complied with or they failed to comply with the established rules of evidence; and, gentlemen, we have rules in the conduct of criminal trials the same as you have in any other function. Therefore, you are not to concern yourselves with the reasons that impelled me or motivated me in ruling as I did. I was dealing there with questions of law. You have no concern with the law in this case anymore than I have with the factual side of this case.

Therefore, don't consider the reasons that impelled me to do it, and you will consider only such evidence as the Court permitted to get into the record. In other words, where a question was asked and an objection was interposed, and I sustained the objection, there was no answer given. The mere asking of a question is not evidence. Forget, in other words, that the question was ever asked, and consider the evidence here only on the basis of such evidence that the Court permitted to get into the record.

At the end of the People's case, and again at the end of the whole case, you remember all the lawyers came up to the bench here. They addressed themselves to the Court regarding certain legal phases, certain legal implications attendant upon the law involved here. I have made my ruling, and in effect it is this. I am submitting to you for your final determination the issue of the guilt or the non-guilt of these defendants according to law as it will be expounded to you in a few moments.

You heard reference made to an indictment. What is an indictment? It is an accusation in writing. It is informative. It tells the defendant what he is charged with, the scope, the reason, why he is indicted, the crime he is charged with having committed. This is not proof of the defendant's guilt. It has not what we call in law any probative value. It is not proof; it is just an outline informing the defendants of the nature of the charges against them. In other words, it is the vehicle or the instrument by which or through which defendants come into court there to meet their accusers; in other words, to go to trial. Therefore, there is no justification in a finding of guilt simply based on the charge here. This is only a charge, and you are to give it no further effect

other than what I have instructed you.

As they sit there, the defendants are cloaked with; they are clothed with a certain amount of protection that the law visits upon them. They are presumed to be innocent. They start out with the inference that they are presumed to be innocent, and that presumption runs with them throughout the entire trial until you by your verdict should say otherwise. In other words, the law says you are presumed to be innocent. What does it all mean in simple language? It means this; whereas in other countries a defendant must prove his innocence, here a defendant can remain mute, silent, inarticulate, as these defendants have chosen to do. They don't have to prove anything. The prosecution bears the responsibility of proving their guilt beyond a reasonable doubt, and I will come to that in just a moment.

The legal phraseology, the expression "beyond a reasonable doubt," means what? It is simply this; "reasonable" is something which indicates that the conclusion or the opinion which you hold is something for which you gave yourself a reason; in other words, something founded on reason. We, as rational, sane people, act as we do because reason suggests to us as sane people that our act is a proper act, a sane act.

Therefore, we act according to the suggestion of reason; in other words, we have a reason for doing what we do, and that is all it means here, even though we have the surplussage of language--beyond a reasonable doubt. It means simply what I just told you, a doubt you can give yourself a reason for having, if you have one.

As applied here, a reasonable doubt may be defined as such a doubt you have if, after weighing all the testimony carefully, viewing it from every angle, considering it thoroughly and conscientiously, you then have a doubt regarding the defendant's guilt for which you can give yourself a reason, and that doubt must come from where--from the evidence in the case or the absence or lack of evidence. Such a doubt, a doubt you can give yourselves a reason for having, a reasonable doubt, must be resolved in favor of the defendants.

Of course, a reasonable doubt must not be a subterfuge, a pretext or an excuse to avoid doing what you may consider to be an unpleasant task. That is not a reasonable doubt, and neither is a reasonable doubt predicated upon sympathy for the defendants or prejudice against the prosecution, but if as honest, conscientious jurors, mindful of the sanctity and the

solemnity of the oath that was administered to you-- you remember, you raised your hands heavenward and you swore before the Almighty that you were going to decide this case on the basis of evidence and the law. Obviously, if you allow yourselves to be influenced by considerations of sympathy or prejudice, or any extraneous consideration, you are violating the oath that you took and you are recalcitrant to your duties as jurors. Therefore, hold yourselves to a strict accountability on the basis of the oath that you took, to wit, to decide this case only and solely on the law and on the evidence as it was unfolded in this trial.

Going further, the term "reasonable doubt" does not mean beyond all peradventure of a doubt; it does not mean beyond every possible doubt or beyond a grave doubt or a slight doubt; it means just what I said a moment ago; you hold the District Attorney to that degree of proof that the law holds him to, no more and no less, and again I repeat--to prove the defendants guilty beyond a reasonable doubt.

You cannot expect the prosecutor in any criminal case, gentlemen, to come into a court room armed with a motion picture camera and say, "Gentlemen, I now show you pictures which prove that it is impossible

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for the defendants to be innocent." Such degree of proof is rarely attainable in the administration of criminal justice. Hold him, therefore, to what the law holds him--to prove the defendants guilty beyond a reasonable doubt.

The question of the punishment that may be visited upon the defendants, should you find them guilty, is no concern of yours. You are not to talk about it. Give it no thought. Clearly, your function here is to decide whether they are guilty or not guilty according to law. Give it no thought. Clearly, your function here is to decide whether they are guilty or not guilty according to law. The punishment rests with the Court. Therefore, do not concern yourselves with; do not talk about, don't give any thought whatever to what may happen to these defendants if you find them guilty. It is none of your concern, anymore than it is my concern to decide what the facts in this case are.

You have heard the legal effect of the indictment, and I shall now read the indictment to you. In other words, I shall read now the charges against the defendants. These defendants, and two others, who are not on trial, who have since pleaded guilty, were charged by the Grand Jury with the crime of manslaughter

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35) in the first degree, which they claim was committed
36) as follows; "The defendants, acting in concert, and
each aiding and abetting the other, on or about April
8th, 1959, in the County of Kings, without a design
to effect death, in the heat of passion, struck
Jesse J. Cross, also known as Jessie J. Cross, with
a dangerous weapon, to wit, a dangerous knife, and
with their hands, fists, and booted feet, and thereby
inflicted divers wounds upon Jesse J. Cross, also
known as Jessie J. Cross, thereafter, and on or
about April 8th, 1959, said Jesse J. Cross also
known as Jessie J. Cross, died of said wounds, said
act not being justifiable or excusable." The next
charge is one of assault in the second degree which
they claim was committed by the defendants acting
in concert, and each aiding and abetting the other,
on or about April 8th, 1959, in the County of Kings,
assaulted Jesse J. Cross, also known as Jessie J.
Cross, by wilfully and wrongfully wounding and in-
flicting grievous bodily harm upon him with their
hands, booted feet, and knife.

Gentlemen, the two charges I have read are
separate and distinct crimes. I shall later on,
in my charge, differentiate for you and tell you
what your considerations will be and what your con-

clusions may be. For the time being, we are not concerned with that.

Let us now define and discuss the charge of manslaughter. Manslaughter in the first degree, and that is what we are concerned with now, is defined as follows:

"Such homicide is manslaughter in the first degree when committed without a design to effect death, in the heat of passion, by means of a dangerous weapon."

I have read only that portion of the law as is applicable to the charge here, because the charge here is that the crime was committed by means of a dangerous weapon.

Therefore, manslaughter in the first degree is committed when without a design to effect death, in the heat of passion, by means of a dangerous weapon, a homicide ensues.

Before you take up and consider that, I call your attention to Section 1041 of the Penal Law which reads as follows:

"No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of the killing by the defendant as alleged are each established as independent facts,

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the former by direct proof, and the latter beyond a reasonable doubt. That is what we call in law the corpus delicti; that is, the body of the crime, not the body of the person, but the body of the crime. We call it in law the corpus delicti.

Gentlemen, following that reason, that someone is dead is directly proved whenever a dead body is found. Its identity as that of the person alleged to have been killed is the further fact next to be established in the process of investigation, and the identity must be established beyond a reasonable doubt.

From the testimony of Dr. Ruger, who performed the autopsy, and who testified that he saw the dead man in the morgue on the date mentioned by him and that the dead man was identified to him by Mrs. Cross and by Patrolman Allocco, there is direct proof here, if you believe it, of the death of Jesse J. Cross.

As to the killing by the defendants, as charged, proof as to that may be either circumstantial or direct, but it must be proved by the People beyond a reasonable doubt. Before these defendants may be convicted of manslaughter, there must be proof, direct proof, that the person who is alleged to have been killed is dead, and either direct or circumstantial

evidence that the person who is dead is the person alleged to have been killed. The fact of the killing by the defendants must be shown by direct or circumstantial evidence or by both, and beyond a reasonable doubt.

The prosecution need not prove that there was no design to effect death. If you come to the conclusion, gentlemen, that the prosecution has established the guilt of the defendants, and the essential elements of the crime of manslaughter in the first degree beyond a reasonable doubt; that is, that the death was caused by the use of a dangerous weapon, and by a dangerous weapon in this case is meant a knife, then it will be your duty to convict them of the crime of manslaughter in the first degree.

If you come to the conclusion that the guilt of the defendants has not been proved to your satisfaction beyond a reasonable doubt as to one or both, then you will find such person as to whom you entertain a reasonable doubt not guilty and convict such person regarding whose guilt you are satisfied beyond a reasonable doubt.

You will note the charges that the defendants, acting in concert, aided and abetted each other. Let us read Section 2 of the Penal Law, which reads

as follows: "A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission, and whether present or absent, under the law is a principal."

By the provisions of the law just read to you, the person committing the act which constitutes a violation of the Penal Law, and anyone associated with him, inducing, helping or encouraging the perpetration of the criminal act, are all guilty as principals; in other words, the law makes no distinction in point of view of culpability or guilt between the person or persons who are actually present and take part in the commission of the criminal act and their accomplices. The one who does less is as guilty as the one who does more. If all are engaged in a common purpose or design, and while so mutually engaged, anything done or said by any of them, intended to effectuate the common purpose or design, is binding upon and attributable to all who are parties to the common enterprise. After the attainment of their objective, however; that is, after the commission of the crime charged, the mutuality or design or the mutual understanding concerning the commission of the crime, terminates, and anything

thereafter said or done by any of them binds only the one who says or does the thing.

You will recall I charged you previously on the effect to be given to the alleged admission by the defendant. I charged you and I again charge you, the statement made to the District Attorney which they claim to have been a confession, having been made after the commission of the crime, then and there, the binding effect is only on the one who made the statement to the exclusion of the other defendant.

The theory of the case here is, gentlemen, that the defendants, and the others who also were indicted, but who are not any longer on trial, regarding whose guilt I charge you now, even though they are not on trial, they were still active participants in the crime, and as to their testimony, you will consider it with caution, particularly since there is evidence that they do expect some consideration from the Court in exchange for the giving of the testimony. In each instance the plea is to be reduced to a lower plea. You will, therefore, scrutinize their testimony very carefully. As to their testimony, the law goes further. An accomplice's testimony is not sufficient. It must be corroborated by other

evidence which tends to connect the defendant with the commission of the crime. You will now consider apropos of that, and on that score, the testimony of the witnesses in this case.

Briefly, and I am not going to review the testimony here, it was done very comprehensively by counsel for both sides; the contention of the prosecution, gentlemen, is, briefly, that on April 8th, 1959, in this county, at a playground in a public park, where these defendants and a person named Jesse Cross, who is no longer with us, he having died as the result of an assault committed on him, but they were there all drinking wine when an argument ensued, as a result of which, the acts which you are considering now occurred.

In support of its contention, the prosecution called a number of witnesses whose testimony you have heard, and I will tell you now, you are not to consider such testimony as I may touch upon as being more important than the other testimony in the case; not at all. Your bounden duty is to consider all the evidence in the case, both for and against. All the testimony is to be considered by you, but briefly, in order to assist you, and to bring out what I have referred to as the contention of the

prosecution, you have the testimony of the witness named Abrams who said that as the result of a conversation he had with Smith, Smith is alleged to have said to him, "We just messed up a guy." The prosecution submits that to you in the nature of a confession or admission of guilt.

The witness La Frank testified that Smith in his presence took out a knife, and La Frank also testified that Leroy Sprinkler pushed across and he also testified that he saw Leroy Sprinkler kick Cross. Burroughs testified that Fred Sprinkler stabbed the deceased in the region of the stomach, and he also testified that Leroy gave the knife to him, and he also saw Leroy smack Cross. I am using the language as it was given here.

Detective Burnes testified that Leroy Sprinkler told him that he hit Cross. Detective Reiter said that Smith told him where the knife had been thrown, and that as a result of such information, he Reiter, and the defendant Smith went there where the knife was recovered.

Fred Sprinkler testified that Smith told him that he had stabbed Cross twice. He also testified that the defendant Leroy Sprinkler, his brother, simply pushed him away.

These are the circumstances upon which the prosecution submits this case to you. You are going to determine on the basis of the testimony in this case, gentlemen, whether or not the theory as I have outlined it for you; that is to say, the charge that the defendants, acting in concert, aiding and abetting one another in the heat of passion, without a design to effect the death of the deceased, and I repeat, what is meant by that? There is no claim or contention here that the defendants intended to kill. If such were present, the charge here would be either murder in the first degree or murder in the second degree.

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Therefore, there is no claim that they intended to do what they are charged with doing. The law says that if you do anything in the heat of passion, but without a design, without an intent to kill, then you may be guilty of manslaughter in either the first or second degree, and the charge here is manslaughter in the first degree because they claim the killing resulted from the use of a dangerous weapon; that is to say, the knife. That is, briefly, the contention of the prosecution, and that gives you the comprehensive or complete status or picture of the whole case.

The defendants did not testify in this case. I charge you now that a person or persons accused of crime may or may not refuse to testify in their own behalf, and their failure to do so raises no presumption against them; in other words, the mere fact that the defendants did not testify, raises no unfavorable impression against them.

The defendants have not taken the stand and you will consider then the case on the basis of the testimony you have heard.

Before I go further, gentlemen, let us reason this thing out so that you may apply the rules that I have suggested for your guidance and the law. I repeat, in order to convict the defendants, you must be satisfied beyond a reasonable doubt as to the manslaughter, that they and each of them and the other people who were associated with them, according to the charge, acted in such a way that they aided and abetted each other, so that the act committed and which resulted in the death of the deceased can be charged or is chargeable to them. I have given you the law on the effect to be given to a person who is concerned in the commission of a crime and who aids and abets in the commission. If you find that the defendants aided and abetted, if they did

anything to indicate that they were mutually concerned in the commission of this act, the one who did little is just as guilty as the one who did much.

Of course, the mere presence of the defendants there, without saying or doing something, which you might construe to be done or said to effectuate their common objective; in other words, if they were there at that time and they did or said anything which was intended to carry out their objective, then I charge you as a matter of law that you may find that the defendants are guilty under the theory that being accomplices, the act of one binds the other, but I repeat, in order to convict them, you must find beyond a reasonable doubt that they did aid and abet, that they were concerned in the commission of the crime, that they did something to carry out their mutuality of design or the effect to be given to their act must be such which proves to you beyond a reasonable doubt that they were engaged in, that they were pursuing a line of activity which was intended to bring about the act which resulted in the death of the deceased.

If you are satisfied that they did, whether they did much, whether they did little, were they there--being there alone is not sufficient--but did they

say anything, did they do anything which led or helped to carry out this crime; then I charge you that you may find them guilty of manslaughter in the first degree.

We have the other charge, assault in the second degree. The defendants are charged with wilfully and wrongfully assaulting the deceased Jesse Cross by the use of a dangerous weapon which is likely to produce grievous bodily harm. The prosecution must establish beyond a reasonable doubt as to this charge of assault that the defendants assaulted Jesse Cross with the specific intent to do him bodily harm, and that they used for that purpose the knife in question. It must also be shown that the knife in question was an instrument or thing which by its very nature or character was likely to cause grievous bodily harm.

We speak of intent. Intent, gentlemen, is the secret and silent operation of the mind whereby a person seeks to attain a certain objective, and like every other mental process or function, intent is not visible to the naked eye. We can't open up a man's skull and look into his cranium to see what he is thinking about, but we may judge his acts either by verbal declarations, by what he says, or you have heard

the saying, "actions speak louder than words." So that the remedy of ascertaining one's intent is not limited merely to the exercise of your vocal cords. You may give out with expressions of what your intent is by the way you are conducting yourself. In other words, actions speak louder than words, and the law says that every person is presumed to intend the natural consequences of his act.

Here you have the testimony of Dr. Ruger, and I am digressing for a moment in order to differentiate between the two charges. They are two separate and distinct charges. Dr. Ruger testified that Cross met his death as the result of fourteen stab wounds. Therefore, in his opinion--and he is an expert--the death came about as the result of Cross being stabbed. Here the charge is, not that there was a stabbing insofar as the assault is concerned, but wilfull and dangerous bodily harm was inflicted upon the deceased. Grievous bodily harm is such harm which may be characterized by physical pain and suffering, hence suffering that is serious. It is not enough merely to injure, even if the grievous bodily harm results; rather, it is essential that intent to inflict the harm be present.

Gentlemen, the two charges, as I have already in-

dictated, are separate and distinct, requiring different degrees of proof, different kinds of proof. As to the manslaughter, do you find that these defendants were engaged in, involved in, carrying out their part; that they were acting in concert, that each one was doing something? Take the baseball game, the catcher and the pitcher; they each have objectives, but with all their concerted action, they produce one result. That is why you say they were acting in concert, or they were aiding and abetting each other. If you find that on that occasion there two defendants, and the others who are not on trial, all of them contributed to, by their act or by their statements, or did anything which you construe as having brought about or was intended to effectuate the carrying out what they were there to do; that is to say, stabbed the deceased, then I charge you as a matter of law you may find both the defendants guilty of the crime of manslaughter in the first degree.

If you have a reasonable doubt regarding the guilt of both or one of these defendants, regarding the crime of manslaughter in the first degree, you will then consider whether or not such individual regarding whom you entertain a doubt respecting the manslaughter charge, is guilty of assault in the second

degree.

Gentlemen, you then apply the law and consider the evidence. Do you find that anybody in this case, either one of these defendants, wilfully wounded or assaulted the deceased Jesse Cross? We are not concerned with the death in the assault charge, but do you find that the defendants wilfully wounded the deceased? Remember, there was testimony here about kicking and punching and shoving. I charge you now that is not the producing cause of death--kicking, punching and shoving. The cause of death will be predicated only on the stab wounds. If you find that either one of these defendants or both of these defendants did not do anything under the law, as I have given it to you, were not concerned in the killing, do you find that either one of them is guilty of having assaulted this Jesse Cross, of inflicting grievous bodily harm on Jesse Cross? That is for you to determine.

Gentlemen, you have two defendants on trial. The fact that they are both being tried jointly does not mean that you must not consider the case individually as against them. You have to go along on the theory that you have two separate, individual trials here. First decide the case as to one and then as

to the other. If you find that both defendants are guilty of manslaughter in the first degree beyond a reasonable doubt, say so, and find them guilty. If you have a reasonable doubt as to their guilt, acquit them. If you have a reasonable doubt regarding the guilt of one or both as to the charge of manslaughter, you will then proceed to determine whether or not you find them guilty beyond a reasonable doubt as to the charge of assault in the second degree.

I repeat, even though you have two defendants here, you must return two separate and distinct verdicts. I charge you again, you have two separate and distinct crimes.

Let me exhort upon you, gentlemen, we maintain our courts in order that trials may be fair. We maintain our courts so that every defendant charged with the commission of a crime may have his day in court. Don't let sympathy, passion or prejudice play any part in your deliberations here. Decide this case on the basis of the oath that you took. Remember the solemnity of the oath that was administered to you. Let your verdict, whatever it may be, reflect an honest, courageous consideration of the law in the case and the evidence, free from, stripped of any consideration other than those considerations contained in

and outlined in the oath that you took.

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Your verdict in this case, which must be unanimous, twelve one way or twelve the other, will be, not guilty as to both or guilty as to both on the manslaughter charge if you are satisfied as to the guilt of both beyond a reasonable doubt, or you may find one defendant guilty of manslaughter in the first degree and the other one not guilty, but guilty of assault in the second degree. If you find them guilty of manslaughter, you will find them not guilty of assault. If you find them not guilty of manslaughter, you may consider if you find them guilty of assault in the second degree.

Jurors Number 13 and 14, step aside for a moment.

Are there any requests or exceptions to the charge?

MR. STEINHAUS: Just one, your Honor.

THE COURT: Come up to the bench, gentlemen.

(At the bench.)

MR. STEINHAUS: I except to so much of the Court's charge as relates to the statement by La Frank that he saw Leroy kick the defendant.

THE COURT: My notes show that on cross-examination La Frank said he saw Leroy kick the deceased.

MR. STEINHAUS: I except to that portion of the

charge, your Honor. I think it would be wise to check with the minutes on it.

THE COURT: I will stand on my notes.

MR. PELCYGER: On behalf of the defendant Joel Smith, I have no exception, but I ask your Honor to charge the jury that the witnesses and the defendants whose cases were severed, Fred Sprinkler and Allen La Frank, are interested witnesses because of the interest they have in the outcome as to whether their pleas will be reduced as the result of their testimony in this case.

THE COURT: Did you hear me charge that their testimony must be scrutinized with great care?

MR. PELCYGER: I have an exception.

THE COURT: Gentlemen, I charged you generally on the attempt to ascertain whether any witness has an interest in the crime, to the effect that such interest may have motivated his testimony. As to Sprinkler and La Frank, the two men who pleaded guilty, you will consider whether you find them to be interested witnesses, but I have already charged you, and I repeat, you are to scrutinize their testimony with great caution.

MR. PELCYGER: I ask your Honor to charge the jury that if the jury find that the evidence is divided

equally as to innocence or guilt, then they must acquit the defendants.

THE COURT: Gentlemen, I have been requested and I do charge you that if you find the evidence is equally divided, one side indicating guilt and the other innocence, then the burden has not been met of proving the defendants guilty beyond a reasonable doubt. In that event, you must acquit the defendants, and if you find--I will go further--if you find that the evidence admits of two constructions, the one indicating guilt and the other innocence, you will similarly acquit the defendants because there again the defendants have not been proved guilty beyond a reasonable doubt.

THE COURT: (continuing) Gentlemen, you may go to lunch, and when you come back, go directly up to the jury room.

(The jury left the court room, but returned immediately and the following occurred:)

THE COURT: Gentlemen, my attention has been called to the fact that I was in error when I said that insofar as the witness La Frank is concerned, that he testified that he saw the defendant Leroy Sprinkler kick the deceased Jesse Cross. I was told that I was wrong. What he testified to was that he kicked Jesse

Cross--that he, La Frank kicked Jesse Cross. I didn't want that to go by unnoticed, because I want to be absolutely fair. That is why I had you brought back. You will forget what I said previously when I said that La Frank said he saw Leroy kick Cross. I was in error and I plead guilty to that.

You may now go to lunch.

(At 2:10 p.m. the jury left the court room, to begin their deliberations following their return from lunch.)

(At 7:10 p.m. the jury returned to the court room:

(Present: The Court, Mr. Levine, Mr. Pelcyger, Mr. Steinhaus, the defendant Sprinkler, the defendant Smith.)

(Roll called.)

THE CLERK: Gentlemen of the jury; have you agreed upon a verdict? If so, rise, Mr. Foreman.

How do you find as to the defendant Joel Smith?

THE FOREMAN: Guilty as charged of manslaughter in the first degree.

THE CLERK: How do you find as to the defendant Leroy Sprinkler?

THE FOREMAN: Guilty as charged--manslaughter in the first degree.

MR. PELCYGER: May I have the jury polled, your

Certificate of Service

November 22, 1974

I hereby certify that a copy of this petition for rehearing with suggestion for rehearing en banc has been mailed to the United States Attorney for the Eastern District of New York.

William E. Carter